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No. 80-544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION, UAW AS AMICI CURIAE

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the International Union, UAW (UAW), respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of the respondents in this case.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout the United States.

The International Union, UAW, which represents approximately 1,250,000 employees, is the largest industrial union in this country.

The AFL-CIO and the UAW are vitally interested in the scope of collective bargaining, which is at the heart of the National Labor Relations Act (hereafter "NLRA"), and the protections given to employees by that Act. Any decision by this Court which would remove "wages, hours, and other terms and conditions of employment" (§ 8(d) of the NLRA) from collective bargaining would severely undermine the rights granted workers in 1935 and preserved in the 1947 amendments. A decision to this effect with respect to bargaining about plant closings, particularly where there are no contractual impediments to such bargaining, would have a severely adverse effect on workers who are particularly vulnerable and needful of the rights which Congress has vouchsafed them.

The UAW represents many workers in industries which are presently in a state of economic decline; the problem of plant closings and economic dislocation, addressed in this case, has had a particularly severe impact on these workers. UAW has, as a matter of policy and industrial practice, sought to engage in bargaining with employers over potential decisions to close facilities where UAW is the statutory representative, and if possible, to prevent such closings. The UAW's experience has been that negotiations over plant closings are fruitful; such bargaining has often avoided closings, or at the very least promoted mutual understanding which has eased the economic and psychological impact on the workers, with beneficial effects for employers as well.

The negotiations between UAW and Chrysler prior to the passage of the Chrysler Loan Guarantee Act of 1979, P.L. 96-185 (96th Cong., 1st Sess.), is one of the most timely and instructive examples of such bargaining. Chrysler's financial difficulties were not rooted in its "labor costs", since those costs were equal to its competitors. Rather. a combination of inadequate product lines, chang-

ing market demands, the energy crisis, massive retooling costs, and cash flow and debt structure problems brought Chrysler to the brink of business failure in 1979. Recognizing Chrysler's financial problems, and to protect the jobs of its members, UAW agreed to $203 million in wage and benefit concessions, and $100 million in pension funding deferrals. UAW took this action without government compulsion, as a result of free collective bargaining.

POINTS TO BE COVERED IN THE BRIEF

The tendered brief supports affirmance of the judgment below, as does that of the respondent, the National Labor Relations Board. The statutory materials and judicial precedents on which the decisions of the Board and of the Court of Appeals rest, of course, play a dominant role in our brief as well. However, our brief adds to that filed by the Board in several respects which we submit will aid the Court in its consideration of this important case.

First, we stress the immediate context in which this case arose—that is, bargaining during a time when the employees were represented by a union, but their terms and conditions of employment were not fixed by an existing contract. It is our submission that the duties of the parties under those circumstances are materially different from those where a contract is in effect, and that some of the concerns which have been expressed regarding the consequences of recognizing that partial closings which result in the loss of jobs are a mandatory subject of bargaining have failed to give adequate attention to this distinction.

Second, our brief emphasizes the complex nature of collective bargaining as contemplated by Congress, and articulated by this Court, particularly in *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1; *Labor Board* v. *Insurance Agents*, 361 U.S. 477; and *Porter Co.* v. *NLRB*, 397 U.S. 99. Specifically, we stress that while the duty to bargain was created in part because it was expected that it would often result in the peaceful resolution of labor-management controversies, it was also understood that agreements might

not always result and that collective bargaining entails the right of each side to use economic weapons in support of its bargaining position. From this fundamental statutory policy we draw the conclusion that the finding below that collective bargaining in this particular dispute could have achieved a mutually acceptable solution is not necessary to support the conclusion that the partial closing in this case is a "term and condition of employment" under § 8(d) and that the employer here was under a duty to bargain. Of course, the fact that the Board made a finding which is irrelevant as a matter of law does not undermine the result which it reached, see, *e.g., Massachusetts Trustees* v. *U.S.*, 377 U.S. 235, 246. However, the basis of the Court's decision is likely to affect the Board's approach and the outcome of other cases. Cf. *First Nat. Bank* v. *United Air Lines*, 342 U.S. 396, 398 (Jackson, J. concurring).

CONCLUSION

For the foregoing reasons we request that the present motion to file this brief *amici curiae* should be granted.

Respectfully submitted,

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This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO and UAW in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

I.

A. Normally, as the instant case shows, an employer decision to terminate an operation is equally an employer decision to terminate the jobs of the employees who were manning that operation. Where there is such a conjunction—where the decisions to close and to discharge are so

inextricably intermixed that they are truly one—we submit that the termination decision (as we shall henceforth refer to it) concerns a "condition of employment" as that term is used in § 8(d) of the National Labor Relations Act as amended (hereafter "NLRA") and is therefore a mandatory subject of bargaining between management and labor.

Employer actions, which result in termination of employment are well within the normal meaning of the phrase "conditions of employment." Moreover, as a practical matter, in an uncertain world it is entirely rational for workers to conclude that a collectively bargained agreement that sets high wages, a sound pension program, an excellent safety system and so on, but does not place any limit on the employer's right to end all those benefits by ending the operation and eliminating their jobs is likely to be illusory.

It would be a cruel irony if § 8(d) were to be interpreted to limit such employees to a bargaining exercise that produces a piece of paper of uncertain worth and does not even provide them the *opportunity* to safeguard what they regard as their most pressing need—job security. Certainly it is more in accord with the basic theory of the NLRA that employees who desire certain job security guarantees—that there will be no closing during the contract term, or that there will be a process of notice and consultation prior to a closing, or if the employer has a number of operations that there will be transfer rights, or that there will be certain payments or other benefits on a closing—are entitled to seek those protections through collective bargaining. The employer may choose to agree or disagree. If there is agreement, that forwards Congress' judgment that collective bargaining is a sound method of keeping industrial peace. If there is disagreement, then the parties are remitted to the use of their economic weapons. That forwards Congress' judgment that a system in which management and labor work out their own problems through tests of strength is superior to the alternatives—first, government dictation of a solution, an approach which has been deemed incompatible with the private enterprise system, or, second,

government protection of the right of employers to dictate terms and conditions of employment and government suppression of the right of employees to protect and advance their job interests, the approach found wanting in the first thirty years of this century and which the Congress that passed the NLRA was intent on ending.

B. It facilitates analysis—indeed, we believe it is absolutely essential to a proper understanding of the problem presented—to focus on the limited legal consequences of a holding that termination decisions are a mandatory subject of bargaining. For the chief argument raised against such a holding has been that it would unduly hamper management in making entrepreneurial decisions, particularly to meet pressing business exigencies. But where the decision in question is to terminate represented employees' jobs, Congress has made the judgment that management and labor must protect and advance their own interests and that it is not the province of government to declare that certain decisions which result in job loss are management "prerogatives" and thereby strip employees of their right to protect their jobs at the bargaining table or in economic warfare. Of course, Congress has not made the judgment that the employees are necessarily entitled to prevail; the outcome may well depend on the relative economic strengths of the parties. *See, e.g., Labor Board* v. *Insurance Agents*, 361 U.S. 477; *Porter Co.* v. *NLRB*, 397 U.S. 99.

The foregoing propositions are elaborated in Part I of our argument.

II.

In Part II of our argument we show that the result in this case is controlled by the result and rationale of *Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U.S. 330 ("*Telegraphers*"). The Court there held that a union demand to bargain about the closing of railroad stations was a mandatory subject for bargaining under the Railway Labor Act because such closings would result in the loss of bargaining unit jobs and that a strike to enforce such a demand was immune from injunction under the Norris-LaGuardia Act.

We show first that, in a holding followed in *Fibreboard Products Corp* v. *Labor Board,* 379 U.S. 203, 210, the *Telegraphers* Court concluded that such a demand encompassed "terms and conditions of employment" under the Norris-LaGuardia Act. This language was adopted in § 8(d) of the National Labor Relations Act.

We show next that the legislative history of the 1947 amendments establishes that the foregoing language was deliberately chosen in drafting § 8(d), under circumstances which preclude petitioner's narrow construction of that provision. These circumstances include the source of that phrase in the Norris-LaGuardia Act and the Wagner Act; in the latter, it appeared not only in the definition of "labor dispute," but also, by virtue of the interrelationship of §§ 8(5) and 9(a), in the provision setting the employer's duty to bargain. They also include the Senate's preference for "terms and conditions of employment" over "working conditions," which defines the scope of bargaining under the Railway Labor Act, and which was feared to be narrower, as well as the Conference Committee's rejection of the House proposal to narrow the subjects of collective bargaining. Finally, they include emphatic reaffirmance of the Wagner Act's policy which favors free collective bargaining. As the 1935 and 1947 reports and debates show, this policy rejects government control of the results of collective bargaining, and provides that control through the process of negotiation between management and labor, reserving to each the right to use economic weapons in order to gain acceptance of its bargaining position. In short, the duty to bargain does not entail the duty to agree. This, as a colloquy in the 1935 House debates shows, was understood to be the employer's defense against being compelled by the Act to keep a plant open. See 79 Cong. Rec. 9682 (June 19, 1935). See also *Labor Board* v. *Jones & Laughlin,* 301 U.S. 1, 45. Section 8(d) was adopted in 1947 in part to reinforce the proposition that the Board may not compel agreements. See *Labor Board* v. *Insurance Agents,* 361 U.S. 477, 488-490; *Porter Co.* v. *Labor Board,* 397 U.S. 99, 105-106, 109.

Finally, we show that petitioner cannot prevail on any principle of management "prerogative." Here again, *Telegraphers* is directly in point because that case expressly disapproved the reasoning of the Seventh Circuit decision which had rested on the same theory. Moreover, insofar as the "prerogative" argument rests on the concurring opinion of Justice Stewart in *Fibreboard, supra,* it is by no means clear that the present case is within the "core of entrepreneurial control" as Justice Stewart used that phase (379 U.S. at 223). Moreover, we submit, with all respect, that if the present case is within that concept and would be outside the duty to bargain under the views expressed in that opinion, those views are contrary to the judgments which Congress has made and has expressed in § 8(d).

ARGUMENT

I.

A. A holding that the employer must bargain over the termination decision in a case like the present would not put any automatic restriction upon his freedom of action. His bargaining obligations arise from § 8(a)(5), as the union's correlative duties arise from § 8(b)(3). If, as we submit, such decisions are a subject which §§ 8(d) and 9(a) make bargainable, §§ 8(a)(5) and 8(d) impose upon the employer the duty, under some circumstances, to negotiate with the bargaining representatives concerning such decisions. Similarly, the representative must negotiate in good faith about the decision if the employer so proposes.

Those obligations arise when the employer and union are negotiating a *new* collective agreement. That is the *only* conclusion, however, that follows automatically upon a holding that termination decisions are a subject of mandatory negotiation.

B. The conclusion that termination decisions are a subject of bargaining comprehended within §§ 8(d) and 9(a) does *not* automatically lead to the further conclusion that an

employer must always consult with the union before a partial closing. The legality of unilateral action depends upon the interpretation of § 8(a)(5), as applied to each particular situation, including the terms of any relevant collective agreement and the customs and practices of the industry. On the other hand, the necessary effect of construing conditions of employment so as to exclude such decisions is to relieve the employer of any legal obligation *ever* to negotiate about any restriction upon an unlimited prerogative.

This is not a purely technical distinction. Labor-management negotiations concerning termination decisions may take either of two forms.

The bargaining may deal with the procedure and substantive rules to be followed during the term of the agreement when the prospect of a closing becomes real—provisions to be written into a collective agreement governing the employer-employee relationship for a substantial period of time. In those contract negotiations there is no problem of immediate operational decisions and no greater need for unilateral action than in fixing any other term of employment.

On the other hand, the issue may arise in immediate concrete terms without relation to the periodic negotiation of collective agreements and in a context in which business exigencies would necessitate prompt action or in which there would not be ample time for detailed negotiation.

Moreover the closing problem may arise (1) during the term of a collective agreement or (2) in the absence of an existing agreement. The legal consequences are entirely distinct.

(1) If the parties deal with termination decisions in their collective agreement, the problem of unilateral action is removed to the sphere of contract administration. One of the strengths of collective bargaining has been its capacity for creating procedures and substantive rules suited to the

needs of the industry and even the particular business. While one extreme calls for vesting absolute freedom in management and the other extreme bars terminations without the consent of the union, there is a wide range of intermediate accommodations appropriately securing the most vital interests of both employers and employees according to the precise industrial circumstances. The place to work out a framework for possible future termination decisions that takes into account the needs of the business, and the host of other relevant considerations varying from business to business, is in the periodic contract negotiations.

Of course if he is acting in good faith, the employer is legally free to negotiate even for a clause securing him the right to terminate at will. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395. And while management may not always be able to negotiate the kind of clause that it desires, because of the opposite interests of the employees, the accommodation resulting from the free interplay of the opposing forces is likely to be a better arrangement for the particular parties, in their peculiar situation, than any solution the law might dictate as a uniform rule for all industries.

The situation is more complicated if the parties sign a collective agreement without express provision governing termination decisions. One solution is to treat the parties as if no agreement were in force. Another view is that there are many matters, which inevitably pass unmentioned, as to which every contract necessary assumes a continuation of the *status quo*. Compare Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev. 1097; *Jacobs Mfg. Co.*, 94 NLRB 1214, *enforced*, 196 F.2d 680, 683-684 (C.A. 2).

That difficult problem, however, is not involved in this case. There is no necessary relation between the only issue raised by petitioner—are termination decisions within the subject matter of statutory bargaining—and the question, what effect has a collective agreement upon the duty to

bargain about subjects not mentioned therein. The latter question is not confined to such decisions; it has arisen even more sharply with reference to conceded subjects of collective bargaining such as pensions and insurance. It need not be decided here because petitioner acted when there was no collective agreement in force.

(2) In the absence of an existing agreement the problem of unilateral action must be resolved solely by reference to the statutory duty "to bargain collectively." This Court has not had occasion to examine the problem in all its ramifications, and this case does not raise any new facets of the problem. In *Labor Board* v. *Katz*, 369 U.S. 736, the Court held that "an employer's unilateral change in conditions of employment under negotiation is • • • a violation of § 8(a)(5)" (*id.* at 743) because it is "tantamount to an outright refusal to negotiate that subject" (*id.* at 746), but the Court reserved judgment as to whether "there might be circumstances which the Board could or should accept as excusing or justifying unilateral actions" (*id.* at 748).

In the instant case the employer simply refused to meet at all or even to respond to the union's request for a meeting. In that situation we believe that the employer should not be heard to claim justification after the fact.[1]

C. Just as §§ 8(a)(5) and 8(d) leave a measure of flexibility with respect to unilateral action, so are the statutory requirements concerning the character and length of negotiations adaptable to the exigencies of the particular business situation. An employer is under no duty to yield to the union (nor is the union under such a duty).

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[1] While the Petitioner claims that notice and bargaining over plant closings will lead to loss of productivity or sabotage, or to the sudden loss of key workers, industrial experience teaches exactly the opposite. See A. Weber and D. Taylor, *Procedures for Employee Displacement: Advance Notice of Plant Shutdown*, Journal of Business, (July 1963) pp. 312-313.

The amount of time and discussion required to satisfy the statutory obligation "to meet at reasonable times and confer in good faith" varies with the circumstances. Ordinarily, before the employer reaches a final decision to take action, he must meet with the union, if it so desires, and give it the reasons for his proposed action. He must hear in good faith any union arguments for a contrary policy. Alternatives must be explored. Then either the employer and union will agree or the employer will make its decision and the union may resort to self-help. But we recognize that in certain circumstances the employer may act sooner. There may be an emergency that makes it impossible to consult the union before taking action.

Moreover, even where the employer is able to, and does, meet with the union before reaching a final decision, the amount of negotiation required in order to satisfy the statutory standard must take into account the exigencies of the business and the potentials of further negotiations. If the economic forces are truly pressing and the union can offer no compensating concession, an "impasse" in the negotiations that would permit the employer to take action may be reached far sooner than where there was ample time for negotiation or the union was in a position to alleviate the conditions which motivated the employer's proposed action, and was advancing meaningful alternatives. The Act "does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position." *American National Insurance Co., supra,* 343 U.S. at 404.

D. The freedom to negotiate mutually satisfactory arrangements concerning future terminations meets many of the fears that have been expressed concerning the danger that the necessity of collective bargaining over such decisions may unduly hamper management in meeting business opportunities and exigencies. Additional flexibility is introduced both by the legal principles governing the right to take unilateral action and by the kind of negotiation that is required to satisfy the obligation to bargain in good faith. No doubt employers remain subject to some restric-

tions upon the kind of freedom that might best serve their interests, even assuming that employers always acted fairly and wisely without the necessity of consulting the representatives of their employees. The same argument can be made, upon the same assumption, about a host of traditional subjects of collective bargaining. The judgment Congress expressed in enacting the NLRA was that the interests of employees should be consulted, and that the public interest, which includes the interests of both employers and employees, would be best served by subjecting problems between labor and management to the mediatory influence of collective bargaining.

II.

The sole issue in this case is whether an employer who decides to close a part of his operations and thereby to reduce the number of bargaining unit jobs is ever required to bargain with the representative of those employees about that decision. The controlling precedent is the decision of this Court which confronted that precise question and squarely answered it in the affirmative—*Order of Railroad Telegraphers* v. *Chicago & Northwestern Railway Co.*, 362 U.S. 330 (hereafter "*Telegraphers*").

A. In the *Telegraphers* case the railroad had proposed to discontinue a number of its stations. The union, which represented station agents, responded by proposing a contract clause which would state that no job "will be abolished or discontinued except by agreement between the carrier and the organization," and threatened to strike in support of this demand. The Seventh Circuit decided that this demand was beyond the scope of bargaining under the Railway Labor Act (45 U.S.C. § 151 *et seq.*):

> Certainly the Railway Labor Act does not divest a carrier of the right to manage and control the administrative functions of its business enterprise and conduct its business operations without exercise of a veto power by the Union. Here the Union is demanding such veto power over the abolition of any position in existence on December 3, 1957. • • •

> In short, this is an attempt by the Union to arrogate to itself the prerogatives that have been traditionally and rightfully management's, while, at the same time, assuming none of the corresponding burdens and responsibilities. [*Chicago & North Western Ry. Co.* v. *Order of Rail. Tel.*, 264 F.2d 254, 258 (C.A. 7), *reversed*, 362 U.S. 330.]

Elaborating on its views concerning management "prerogatives", the Seventh Circuit said:

> The proposed contract change in the case before us represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations. It is perhaps significant that on oral argument, counsel for the Union expressed the opinion that a demand for veto over discontinuing trains, while less reasonable than that proposed here, would constitute a bargainable issue under the Railway Labor Act. [264 F.2d at 259]

On this basis, the Seventh Circuit thereupon concluded that the union's demand was:

> completely outside the ambit of "rates of pay, rules or working conditions", as those words are used in the Railway Labor Act, * * * and hence is not within the scope of mandatory bargaining. Therefore, the terms of the Norris-LaGuardia Act are here inapplicable. [264 F.2d at 260, citation omitted]

The Court of Appeals thereupon enjoined the union's strike in support of the no-closing proposal.

This Court reversed the Seventh Circuit. The *Telegraphers* Court held, first, that the strike could not be enjoined in light of Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113(c), which includes in the definition of a "labor dispute" safeguarded from judicial governance "any controversy concerning terms and conditions of employment." The Court held:

> Unless the literal language of this definition is to be ignored, it squarely covers this controversy. Congress made the definition broad because it wanted it to be broad.

• • •

> Plainly the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. The District Court's finding that "[c]ollective bargaining as to the length or term of employment is commonplace," is not challenged.
>
> We cannot agree with the Court of Appeals that the union's effort to negotiate about the job security of its members "represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations." The Railway Labor Act and the Interstate Commerce Act recognize that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system. The Railway Labor Act safeguards an opportunity for employees to obtain contracts through collective rather than individualistic bargaining. [362 U.S. at 335-337, footnotes omitted]

In addition, the Court held that the union's demand was not unlawful, but rather was a legitimate subject for collective bargaining under Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, which requires bargaining with respect to "rates of pay, rules, and working conditions."

> Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." [362 U.S. at 339]

Petitioner and the *amici curiae* supporting its position maintain a "sullen silence" about *Telegraphers*; that decision is not cited in any of their briefs. Yet *Telegraphers*

controls the present case: 1) by its analysis of "terms and conditions of employment"; 2) by its holding that partial closings which result in loss of jobs are within the duty to bargain established by the Railway Labor Act; and 3) by its rejection of the Seventh Circuit's "management prerogatives" reasoning, which pre-echoes the principal theme sounded in the arguments on petitioner's side.

B. The holding in *Telegraphers* that the union's bargaining demand there was within the phrase "terms and conditions of employment" provides conclusive support for the proposition that the union's proposal here is within the "terms and conditions of employment" which are mandatory subjects of bargaining under § 8(d) of the National Labor Relations Act. That this term has the identical meaning in § 13(c) of Norris-LaGuardia and § 8(d) of the NLRA was recognized in this Court's opinion in *Fibreboard Corp.* v. *Labor Board*, 379 U.S. 203 (hereafter *"Fibreboard"*).

This Court said:

> The subject matter of the present [subcontracting] dispute is well within the literal meaning of the phrase "terms and conditions of employment." See *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U.S. 330. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit. [379 U.S. at 210.]

Petitioner recognizes that it must lose this case under what it terms a "literal approach to bargainability determinations involving closings of a facility in whole or in part," which it urges the Court to reject. (Pet. Br. 15, upper case omitted.) [2] But the legislative history shows that Congress deliberately chose these words against a back-

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[2] It may be useful to contrast the present case with the occasions on which the Court has expressly rejected a literal reading of the

ground that leaves no room for a narrowing of their terms by construction. Moreover, that history reinforces our submission that the *Telegraphers* precedent governs in this case.[3]

Petitioner asserts that "Restriction of mandatory bargaining to 'wages, hours, and other terms and conditions of

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NLRA. In *Connell Co.* v. *Plumbers and Steamfitters*, 421 U.S. 616, the Court held that the construction industry proviso to § 8(e), did not protect a particular subcontracting agreement at issue there although "On its face, the proviso suggests no such limitation." (*id.* at 628). But the Court did so only after determining from the legislative history that that agreement was not "related to any of the[] policies" which the proviso was intended to advance (*id.* at 631), and that approval of the agreement would actually undermine "one of the major aims of the 1959 Act", which had been effectuated by the enactment of § 8(b)(7) (*id.* at 632). So, too, in *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 619, cited in *Connell* (421 U.S. at 628) the Court traced not only the 1959 legislative history of § 8(e), but the prior relevant course of labor legislation to establish that that provision, despite its language, adhered to "the distinction between primary and secondary activity" (*Id.* at 633-640). That distinction was first drawn by this Court despite the language of § 8(b)(4) in *Labor Board* v. *Rice Milling Co.*, 341 U.S. 665, 672-673 in light of the legislative history of § 8(b)(4) and the protection of right to strike in §§ 13 and 7 of the Act. Cf. *NLRB* v. *Operating Engineers*, 400 U.S. 297, 302-305 where secondary activity was prohibited, although its object was not literally covered by the statutory phrase "cease doing business."

[3] We are, of course, cognizant of Justice Harlan's caution "that the National Labor Relations Act cannot be imported wholesale into the Railway Labor arena" (*Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 383), an observation which is equally instructive in the reverse direction. But *Fibreboard* itself shows, by example, that Railway Labor Act precedents may appropriately be followed in determining the scope of bargaining under the NLRA. Indeed, as we shall show (pp. 16-17, *infra*), the words used in the NLRA were substituted in the Senate Bill (which became law in this respect) for the comparable phrase which is used in the RLA, with the understanding that the NLRA language was more expansive.

employment' was the product of the Taft-Hartley amendments adopted by the 80th Congress in 1947." (Pet .Br. 15) This assertion is misleading, to put it charitably. The 1947 Congress deliberately rejected the Hartley Bill's proposed restrictions on mandatory bargaining, and instead adopted the phrase "wages, hours and other terms and conditions of employment" from the Wagner and Norris-LaGuardia Acts, in which this language was understood to be expansive. Indeed, the 1947 history shows that Congress used the phrase "conditions of employment" to preclude a narrow construction of the scope of collective bargaining.

First, as we have seen, the phrase "conditions of employment" had its source in the definition of labor disputes in § 13(c) of the Norris-LaGuardia Act, of which Mr. Justice Black wrote in *Telegraphers*: "Congress made the definition broad because it wanted it to be broad." (362 U.S. at 335, quoted at p. 11, *supra*.) This definition of "labor dispute" was adopted *in haec verba* in § 2(9) of the Wagner Act and retained in full in 1947. So, too, the 1947 amendments retained what is now § 8(a)(5) [4] which, in establishing the duty to bargain, incorporates § 9(a) by reference, and (insofar as here pertinent) the language of § 9(a) itself:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * * "

Since the employer's duty to bargain under the Wagner Act extended no further than § 8(5), as read in light of § 9(a), petitioner is in error in contending that "no such

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[4] "It shall be an unfair labor practice for an employer * * * to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

limitation [as it seeks to find in § 8(d)] was included in the Wagner Act." (Pet. Br. 15.) [5]

Of critical importance too is the fact that in considering what became § 8(d) of the Act, the 1947 Congress considered and rejected proposals for narrower words, which were offered in an effort to curtail the scope of labor-management negotiations. The bill which passed the House (the Hartley bill) had enumerated the particular subjects which were to be encompassed within the term "collective bargaining" and to constitute the scope of bargaining required by the Act.[6] The Senate Labor Committee bill followed the form of § 8(d) as enacted. To underline the breadth of its approach the phrase "conditions of employment" was used by the Senate in preference to "working conditions" (used in the Committee bill) in response to Senator Wagner's fear that the term "working conditions" would narrow the scope of collective bargaining. Senator Wagner said:

> By substituting the narrower term "working conditions" for the present broader term "conditions of employment," the bill would narrow the scope of col-

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[5] Because the Board was confronted with the same issue under the Wagner Act, and because § 8(d) retained the critical language "other conditions of employment", pre-Taft-Hartley decisions interpreting the phrase "other conditions of employment" have been followed by this Court as pertinent precedents in construing § 8(d). See the citation of *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 518, *enforcement denied on other grounds*, 161 F.2d 949 (C.A. 6, 1947), in *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295 and *Fibreboard, supra*, 379 U.S. at 213.

[6] H.R. 3020, 80th Cong., 1st Sess., § 2(11), 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), 163-167 (hereafter "Leg. Hist."); House Report No. 245, 80th Cong., 1st Sess., 22-23, 1 Leg. Hist. 313-314. Section 8(b)(3) of the Hartley bill would have prohibited "strike[s] or other concerted interference with an employer's operations, an object of which is to compel the employer to accede to the inclusion in a collective-bargaining agreement of any provision which under § 2(11) is not included as a proper subject matter of collective bargaining." 1 Leg. Hist. 179.

> lective bargaining to exclude many subjects, such as, perhaps, pension plans, insurance funds, which properly belong in the employer-employee relationship and in regard to which the employer should not have the power of industrial absolutism. [1 Leg. Hist. 998.]

The Senate's acceptance of Senator Wagner's point is of particular importance in this case, because the term "working conditions" is that which is used to define the duty to bargain under § 2, First of the Railway Labor Act (45 U.S.C., § 152, First). Section 2, First, of course, was held to encompass, and thus to require bargaining about, the station closings in *Telegraphers,* 362 U.S. at 339.[7] In the light of Congress' conscious choice of what the legislature considered to be the broader phrase "condition of employment" it would be a gross distortion of the Congressional intent to hold that a partial closing is not a mandatory subject of bargaining under § 8(d).

This Court recognized in *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 495-496, that the Hartley Bill's "attempt to 'strait-jacke[t]' and to 'limit narrowly the subject matters appropriate for collective bargaining' • • • was rejected in conference in favor of the more general language adopted by the Senate and now appearing in § 8(d)" (citations omitted).

The *Ford Motor* opinion drew from this 1947 history the lesson "that Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain." (*Id.* at 496.) That is a lesson which cuts strongly against petitioner's attack

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[7] The Court said:

> "Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." 45 U.S.C. § 152, First."

on the Board's bargaining order which is, to say the least, "reasonably defensible [and therefore] should not be rejected merely because the courts might prefer another view of the statute." (*Id.* at 497.) Moreover, petitioner cannot claim that it comes within any of the exceptions there articulated to the rule of deference; on the contrary, one of those exceptions lends independent support to the conclusion reached by the Board here. Whereas in *Chemical Workers* v. *Pittsburgh Glass,* 404 U.S. 157, the Board had "stretched beyond its plain meaning" the term "employee" which was critical there (see *id.* at 166), the Board's interpretation of the phrase "conditions of employment" in the present case is, as we have seen (and petitioner does not dispute) in accord with the plain and accepted meaning of that phrase.

While stressing that the 1947 legislative history showed that Congress retained the primacy of the Board in defining the subjects of bargaining, the Court in *Ford Motor* also noted the relevance of that history to the substantive issue of the scope of bargaining by quoting two earlier decisions:

> See also *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 157, 178 (1971) ("Section 8(d) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining"); *East Bay Union of Machinists* v. *NLRB,* 116 U.S. App. D.C. 198, 201, 322 F.2d 411 ,414 (1963) (Burger, J.), aff'd *sub nom. Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964) ("The use of this language was a reflection of the congressional awareness that the act covered a wide variety of industrial and commercial activity and a recognition that collective bargaining must be kept flexible without precise delineation of what subjects were covered so that the Act could be administered to meet changing conditions"). [441 U.S. at 496-497, n. 9]

Indeed, while we submit that the foregoing history compels the conclusion opposite to petitioner's plea that the literal language of § 8(d) be given a constricted reading, namely that Congress intended that it be given its full scope, that conclusion is further buttressed by the legisla-

tive history of another portion of § 8(d), as well as by a key statement of Senator Taft concerning the policy and philosophy underlying the entire Act.

Section 8(d) also provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." As this Court explained in *Porter Co.* v. *NLRB*, 397 U.S. 99, 106:

> In discussing the effect of that amendment, this Court said it is "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB* v. *American Ins. Co.*, 343 U.S. 395, 404 (1952). Later this Court affirmed that view stating that "it remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements." *NLRB* v. *Insurance Agents*, 361 U.S. 477, 487 (1960).

See also *Carbon Fuel Co.* v. *Mine Workers*, 444 U.S. 212, 219 and the additional cases cited, *id.*

This express restriction is not inconsistent with the grant to the Board, declared in *Ford Motor Co., supra*, of primary responsibility to determine the subjects of bargaining, it having been recognized since the Wagner Act that the scope of mandatory bargaining is not to be universal. For in exercising this responsibility the Board must—as it has here—respect the restrictions which § 8(d) does impose, and therefore may not, in the guise of defining the subjects of bargaining, cut into "free collective bargaining," *Carbon Fuel Co.*, 444 U.S. at 218, any more than it may do so in exercising its authority to enforce "the principle that [the parties] are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *Insurance Agents*, 361 U.S. at 486." After all, in *Insurance Agents*, this Court, reversing the Board, relied significantly on the insight that if in regulating the duty to bargain "the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the

substantive terms on which the parties contract," contrary to the fundamental policy of the Act. (*Id.* at 490. See also *id.* at 497, 498.)

The legislative history of the 1947 amendments shows also that Congress deliberately reaffirmed the statement of Congressional policy which encourages collective bargaining, although that statement would have been eliminated under the House Bill (see 1 Leg. Hist. 160). Section 1 declares that a prime purpose of the National Labor Relations Act is to encourage the settlement of industrial disputes by the process of negotiations between employers and the representatives of employees. As the Court said in *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 42, "Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances." See also *Fibreboard*, 379 U.S. at 211. The Court also said in *Jones & Laughlin:*

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. [301 U.S. at 45.]

This passage was quoted with approval in *Porter*, 397 U.S. at 105.

In *Porter*, the Court set forth some of the reports and debates on the Senate side. The view of the House was entirely in accord. We quote one colloquy, which embodies that position and given the example considered is of special interest here:

> Mr. Taylor of Tennessee. Is there anything in this bill to prevent an operator from closing his plant?
>
> Mr. Griswold. There is nothing in the bill to keep an operator from closing his plant. There is nothing in the

> bill that says you shall reach an agreement—nothing of that sort. It simply provides that labor may bargain collectively. The bill does not fix hours, wages, or working conditions, nor does it allow any Government agency to do so. The bill does not require any employee to join any labor organization. Nothing in the bill compels any employer to make any agreement about anything pertaining to wages, hours, or working conditions in any plant any place. [79 Cong. Rec. 9682 (June 19, 1935.] [8]

All we contend here is that the 1935 Act and the present law require bargaining about plant closings which result in job terminations but do not require either party to reach agreement on this, or any other subject.[9]

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[8] The speaker, Representative Griswold, was a member of the House Committee on Education and Labor and one of the managers on the part of the House when the Bill reached conference, see H. Rep. No. 1371 on S. 1958, 74th Cong., 1st Sess., p. 2.

It is not necessary for our purposes to regard Representative Griswold as having focused his attention on the question whether plant closings (or partial closings) are a mandatory subject of bargaining. It is sufficient that the sponsors of the legislation did not consider that subject to be for any reason beyond the ambit of the collective bargaining which the Bill did require, and that it was the general understanding that the employers' protections against keeping open a plant which they wished to close (or partially close) was that the duty to bargain did not entail the duty to agree.

Shortly thereafter, Mr. Griswold suggested to another opponent that "if we have 12 years to work it out, as the gentleman's side did, we will certainly make a better success of it than his side has." [Laughter and applause.] (79 Cong. Rec. 9682.) There is a certain irony in the fact that when "the [other] gentleman's side" (the Republican party) was returned to legislative power exactly 12 years thereafter, it did amend the National Labor Relations Act in many respects; but what is particularly relevant here is, that the 1947 Congress did *not* change the policy of the Act in favor of free collective bargaining.

[9] When this point is properly appreciated it becomes clear that this case differs entirely from *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, on which the Chamber of Commerce bases its argument: If the Court had construed § 8(a)(3) as forbidding an

As we have noted, and as *Porter* held, the 1947 Act added certain language in § 8(d) in order to assure "freedom of contract" in the face of NLRB decisions which it was thought had departed from this Congressional policy. This change enhanced the policy of encouraging collective bargaining which Congress preserved in § 1. Maintenance of that policy is directly attributable to the views of Senator Taft, who explained his support for free collective bargaining in a speech which this Court twice cited as authoritative:

> Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on the free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the incenvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. In the long run, I do not believe that that right will be abused. * * * [2 Leg. Hist. 1007, quoted in *Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 395, n.21; see also *Bus Employees v. Missouri*, 374 U.S. 74, 82, n.9.] [10]

In *Labor Board* v. *Insurance Agents*, 361 U.S. 477, the Court explained the nature of collective bargaining under the system established by Congress. While the entire portion of the Court's opinion marked *Third* (*id.* at 488-489)

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employer from going out of business where the Board finds anti-union motivation in that action, it would have drawn from § 8(a)(3) a governmental command that he keep his plant open. The duty to bargain about plant closing, however, does not entail such a governmentally created duty because the government does not compel acceptance of the union's demands. *See* the colloquy quoted at pp. 20-21, *supra*.

[10] One of Senator Taft's main concerns, as he made clear in that same speech, was that the alternative to free collective bargaining was government regulation of wages and prices. (2 Leg. Hist. 1007, also quoted in *Bus Employees, supra*, 340 U.S. at 395-396, n. 21. Cf. *Newspaper Pub. Assn.* v. *Labor Board*, 345 U.S. 100, 108.)

is very much in point, we must, given the limitations of space, here confine ourselves to quoting the following:

> It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. [361 U.S. at 488-489.]

Consequently, as the Court observed in *Porter:*

> The Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining. [397 U.S. at 109.]

Protection of the employees' rights to exercise their economic strength to further their interests in a labor dispute was the purpose of the Norris-LaGuardia Act (see *Telegraphers, supra,* 362 U.S. at 335-336) and was carried forward in the Wagner and Taft-Hartley Acts. An interpretation of § 8(d) which excludes from the subject of bargaining any aspect of the employer-employee relationship deprives the employees of the right to protect themselves by collective action against what they consider to be "arbitrary and unfair treatment." See *Jones & Laughlin, supra,* 301 U.S. at 33, and *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209. The position for which petitioner and the *amici* on its side contend would in fact deprive the employees of their right "to protect themselves" against the very loss of their jobs.

C. Petitioner and the *amici* supporting its position can point to nothing in the language, legislative history or policy of the NLRA to justify the contention that partial closing decisions which result in the loss of jobs should be excluded from the subjects of mandatory bargaining. Thus, they fall back on an ill-defined and self-serving concept of "management prerogative" to exclude such decisions from the system which Congress has established, and thereby to deprive employees of the right to avoid or modify such a decision through the mediating efforts of give-and-take negotiations, or through the use of whatever economic resources the employees can bring to bear. That line of argument is irreconcilable with the precedents and the Congressional decisions which we have already discussed in this brief. And even if the issue nevertheless remains fairly open to judicial consideration, experience confirms that free collective bargaining on this subject is both productive and necessary and confirms the judgment of Congress in "imposing legal duties upon employers to meet and bargain with the representatives of employees * * * to create a structure of industrial self-government * * *" (*East Bay Union of Machinists Local 1304* v. *NLRB*, 116 U.S. App. D.C. 198, 201, 322 F.2d 411, 414, Burger, J.) affirmed *sub. nom. Fibreboard, supra*, 379 U.S. 203, 211).

1) As to precedent, we again point out that the opinion of this Court in *Telegraphers, supra*, expressly and unqualifiedly disapproved the "management prerogative" theory which had been adopted by the Seventh Circuit in that case, in holding that the railroads there were not required to bargain about their decision to shut down railroad stations. See 362 U.S. at 339, quoted at p. 12 *supra*.[11]

Petitioner and the *amici* on its side apparently believe

[11] Although this Court was divided in *Telegraphers*, none of the dissenting opinions would have affirmed the Seventh Circuit on the management prerogative theory; rather, the thrust of those opinions was that this Court's decision was inconsistent with the Interstate Commerce Act, which reserved to the states the decision to permit the station closing in question.

that by careful inattention to the *Telegraphers* case they can escape its precedential force and the necessity to reconcile what they say with what was there held.

The discussion at pp. 13-23 establishes that petitioner's position is wholly inconsistent with the decisions which Congress made first in enacting and then in amending the NLRA. We shall not repeat that discussion at this point. Given those legislative decisions, it is clear that in seeking an exception to the duty to bargain those on petitioner's side are asking this Court "to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal,' " contrary to the separation of powers established by our Constitutional system. (See *TVA* v. *Hill,* 437 U.S. 153, 195.) We expect that the Court will find this invitation particularly unwelcome given the unhappy history of judicial interference in labor-management relations, and Congress' "clear disapproval of these free-wheeling judicial exercises" *Railroad Trainment* v. *Terminal Co.,* 394 U.S. 369, 382-383 (Harlan, J.)) [12]

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[12] See also *id.* at 391-393. The Court there recognized that because it lacked judicially usable standards or access to administrative expertise "there is no really satisfactory judicial solution to the problem" of determining what forms of peaceful economic action are permissible under the Railway Labor Act, but concluded "that the least unsatisfactory one is to allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law." To be sure, under the NLRA, such administrative expertise is provided, and the Board has been charged in the first instance to determine the scope of mandatory bargaining. See *Ford Motor Co., supra,* 441 U.S. at 496. We have urged that the Board's authority in this respect must be exercised in accord with the other legislative decisions made in 1935 and 1947. See p. 19, *supra.* In any event, petitioner can derive no support from the commitment of the present issue to the Board, given its decision in this case, which is consistent with the Board's overall position that there is no management prerogative to refuse to bargain about partial closings which result in loss

2) Petitioners place primary reliance on Justice Stewart's concurring opinion in the *Fibreboard* case (379 U.S. at 217 *et seq.*), and particularly on the statement therein that nothing in the Court's holding in that case "should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of intrepreneurial control." (*Id.* at 223.) It is simply assumed, rather than demonstrated, on petitioner's side that the issue to be bargained over here does "lie at the core of entrepreneurial control" within the meaning of that opinion. This assumption seems to us to be unwarranted, first because the termination decision in this case does not fit into any of the "fundamental" management decisions which Justice Stewart there described, and second, because petitioners have shown no distinction between the facts in this case and those of *Fibreboard* which would justify a different result than the concurring Justices reached there. However, if we are wrong in this, and the Board's decision herein is incompatible with the theory of the *Fibreboard* concurrence, we respectfully urge that that theory not be accepted by a majority of the Court. Our principal reason for this submission is that to exclude matters which directly affect employees' job tenure, like the termination decision at issue in this case, from mandatory bargaining would be wholly inconsistent with Congressional policy, and the decisions of this Court which have

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of jobs. Rather, petitioner and others in similar positions have come to the courts in an effort to gain acceptance of their plea to be relieved of that statutory duty. To the extent that some courts have reversed Board bargaining orders in this context, we submit that they have misread the statute, and exceeded their proper functions. That petitioner is able to point out some inconsistencies among Board decisions, is largely traceable, we think, to the Board's effort to accommodate some of these judicial decisions, and, in some instances, the failure to draw the distinction, elaborated in Part I of this brief, between bargaining over the terms of a new contract and bargaining when a contract is in effect, and it may well be that the Board itself has, on occasion, failed to give full effect to the Congressional judgment in favor of collective bargaining.

articulated and effectuated that policy. A secondary consideration is the inherent ambiguity of the concept. Differences as to its meaning will inevitably reflect the different perspectives of labor and management.[13] As we have shown, Congress has not authorized either the courts or the Board to resolve such differences on the basis of their own judgment as to what are and are not "fundamental" management decisions.

D. Under our understanding of the statute it is irrelevant, when parties negotiate over the terms of a new agreement, whether there is a likelihood that bargaining between them will result in avoidance of the partial closing on some basis, such as concessions by the union. To the extent

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[13] When Charles E. Wilson was President of General Motors he said:

"Under these conditions, the freedom of management to function properly without interference in making its every-day decisions will be gradually restricted. The Union leaders—particularly where they have industry-wide power—will have the deciding vote in all managerial decisions, or at least, will exercise a veto power that will stop progress.

"Competition will be stifled and progress in the improvement of industrial processes which reduce the cost and price of the goods produced by industry will be halted.

"Only by defining and restricting collective bargaining to its proper sphere can we hope to save what we have come to know as our American system and keep it from evolving into an alien form, imported from East of the Rhine. Until this is done, the border area of collective bargaining will be a constant battleground between employers and unions, as the unions continuously attempt to press the boundary farther and farther into the area of managerial functions." [Quoted in Neil W. Chamberlain, *The Labor Sector*, p. 342 (1965) ed.)] The specific target of Wilson's objection was a 1947 demand by the UAW that General Motors bargain over pensions. Pensions were, of course, held to be a bargainable subject in *Inland Steel*, 77 NLRB 1, enf'd, 170 F.2d 247 (C.A. 7), *cert. denied*, 336 U.S. 960, and have since been successfully bargained about on innumerable occasions without adverse impact on industrial progress.

that the Board and the court below in this case, and the Third Circuit in *Brockway Motor Trucks* v. *NLRB*, 582 F.2d 720 (C.A. 3) have declared that there is a presumption in favor of collective bargaining, but that it may be overcome if the employer shows that bargaining will be fruitless, the Board and those courts are in error; but they err for a reason entirely opposite to that for which petitioner contends, and which has been accepted by some other lower courts. There is a presumption in favor of collective bargaining in these instances, but that presumption is irrebutable, at least, where the parties' relationship is not governed by a contract (see Part 1), because it has been established by Congress as a matter of policy in § 1 of the Act, and has been implemented in positive law by §§ 8(a)(5), 8(b)(3), and 8(d) (which establish and define the duty to bargain) and by §§ 7 and 13 (which give to workers the right to engage in concerted activity, and protect their right to strike). Therefore, the finding that agreement could result, such as was made in *Fibreboard*, 379 U.S. at 213-214, while it supports the conclusion that a particular subject is susceptible to bargaining, is not necessary to reach the result here, contrary to the reading of *Fibreboard* at Pet. Br. 16-17. (This, of course, does not warrant reversal of the Board's decision, see, *e.g.*, *Massachusetts Trustees* v. *U.S.*, 377 U.S. 235 at 246). However, since the Court may determine otherwise, we show briefly from the experience of the AFL-CIO's affiliates, and of the UAW, that to bargain over a decision to close a plant or other facility where the effect would be the loss of jobs, is often beneficial.

The UAW's experience has been that negotiations over potential plant closing have been fruitful; such bargaining has often avoided closings, or at the very least promoted

[14] This is most true when an employer decides to close for production-related reasons. In such a situation, it is quite possible that a union would offer to change wage rates, work rules, or take other steps which would result in a reduction of production costs. Even when non-production related economic difficulties result in plans to close a particular facility, bargaining often proves productive.

mutual understanding which has eased the economic and psychological impact on the workers, with beneficial effects for employers as well.

The UAW's experience (see Motion, p. ii) is not at all unique, and has in fact been shared by affiliates of the AFL-CIO. In its most recent agreements with Firestone, Uniroyal, Goodyear and Goodrich, the United Rubber Workers obtained from each company a promise to provide 6 months notice of any intended plant closing, in order to afford both labor and management the opportunity to explore any possible means of averting the closure.[15] Such negotiations have occurred. For example, the URW agreed to concessions which included a 13 percent reduction in its contract with Uniroyal, saving the company $54 million in an attempt to avert plant closings and job loss. Similarly, Rubber Workers at Firestone's Noblesville, Indiana plant voted 2 to 1 early this year to save jobs by taking a $1.40 per hour wage cut and giving up cost of living adjustments until 1984.[16]

The Steelworkers[17] have reluctantly negotiated concessions with economically troubled employers, in order to

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Economic adjustments by a union can still help to keep a plant open, and return it to profitability, since economic costs are to a great extent fungible. Reductions in production costs due to wage or other concessions may make up for burdensome costs or business weaknesses in other areas. To save jobs, unions may be willing to engage in such wage-employment tradeoffs. See, Peter Henle, *Reverse Collective Bargaining? A Look at Some Union Concession Situations,* Industrial & Labor Relations Review, Vol. 26, No. 3, April 1978.

[15] See, BNA Daily Labor Report, September 26, 1980, p. F-2. Similarly, the current labor agreements between the United Steelworkers and the major steel manufacturers set forth advance notice and discussion requirements pertaining to plant closings.

[16] See, *Unions Giving Back Contract Gains to Save Jobs in Troubled Industries,* Washington Post, August 4, 1980; *Now, It's Pay Cuts Instead of Raises,* U.S. News & World Report, February 9, 1981; *Firestone Division is Planning to Close Plant in Indiana,* Wall Street Journal, October 30, 1980.

[17] See, *Steelworkers Agree to Delay Pay Raises,* Associated

forestall plant closings and the resultant loss of jobs. UAW has had similar experiences with small employers. In many of those cases it was the employers, rather than the union, which requested negotiations to avoid closings. And the union, acting in responsible fashion, has sat down with those particular employers, carefully analyzed their claims, and made the appropriate recommendations to its members.

This experience demonstrates that labor and management can and do engage in productive negotiations over potential decisions to close plants and find ways to avert those closings, in a manner beneficial to the interests of each. Frequently, ways to solve problems leading to closings are reached, but even if they are not, mutual understanding and trust are engendered. In other words, free collective bargaining in the plant closing context works, just as Congress judged it would. Or, at very least, the chances that it will work "are good enough" to make bargaining worthwhile. See *Fibreboard, supra* 379 U.S. at 214.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

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Press, September 9, 1980; *Unions Making Contract Concessions,* Associated Press, September 10, 1980; *Now It's Pay Cuts Instead of Raises,* U.S. News & World Report, February 9, 1981, p. 74.